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# The Right to Pre-trial Silence: Where Does It Stand and What's Next after *Singh*?

Jamie Klukach and Diana Lumba\*

## I. INTRODUCTION

In *R. v. Singh*,<sup>1</sup> released November 1, 2007, the Supreme Court of Canada filled in the gaps that were left by its earlier jurisprudence on the section 7 right to silence during custodial police interrogation. The scope of the right to silence in this context lingered as a live issue after the Court's landmark decision in *R. v. Hebert*<sup>2</sup> in 1990; and *R. v. Oickle*,<sup>3</sup> rendered a decade later in 2000, deepened the need for clarification about the *Canadian Charter of Rights and Freedoms*'<sup>4</sup> role in protecting a detainee's pre-trial right to silence during police questioning. The intervenors climbed aboard in *Singh*, an indication of the importance of the issue that stood to be resolved.<sup>5</sup>

This paper will look at how the Court's resolution of this issue came, perhaps, as somewhat unexpected against the backdrop of *Hebert* and *Oickle*. It will also consider what directions the law might now move in, toward further refinement of the principles set down in *Singh*.

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<sup>1</sup> [2007] S.C.J. No. 48, [2007] 3 S.C.R. 405 (S.C.C.) [hereinafter "*Singh*"].

<sup>2</sup> [1990] S.C.J. No. 64, [1990] 2 S.C.R. 151 (S.C.C.) [hereinafter "*Hebert*"].

<sup>3</sup> [2000] S.C.J. No. 38, [2000] 2 S.C.R. 3 (S.C.C.) [hereinafter "*Oickle*"].

<sup>4</sup> *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter "Charter"].

<sup>5</sup> Interventions were granted to the Public Prosecution Service of Canada, the Attorney General of Ontario, the Canadian Association of Chiefs of Police and the Criminal Lawyers' Association of Ontario.

## II. THE ROAD TO *SINGH*

*Singh* casts the section 7 right to silence during detained police questioning as being the *functional equivalent* of the common law confessions rule.<sup>6</sup> It lays to rest the controversy concerning the interplay between the confessions rule and the Charter right to silence that followed *Hebert* and *Oickle*. Writing for the Court's majority in *Singh*, Charron J. firmly declared that, in this context, section 7 has no life independent of the confessions rule:

... [T]he confessions rule effectively subsumes the constitutional right to silence in circumstances where an obvious person in authority is interrogating a person who is in detention because, in such circumstances, the two tests are functionally equivalent.<sup>7</sup>

In *Hebert*,<sup>8</sup> the Court recognized a pre-trial right to silence under section 7 of the Charter at the investigative stage of a criminal prosecution. *Hebert* dealt with incriminating statements elicited from an accused in a jail cell by an undercover police officer. The confessions rule offered no protection in these circumstances: the statements would have been admissible because the accused did not appreciate that he was making them to a person in authority. The Court held that the Charter provided protection against unfairness where the confessions rule would not. In defining the pre-trial right to silence, the Court drew on the confessions rule and the privilege against self-incrimination and their unifying theme of "choice". In the circumstances of *Hebert*, the conduct of the police prevented the detainee from being able to make a meaningful choice about whether to speak to them.

Although the question of permissible limits to police questioning of a detainee who *knows that she is talking to the police* did not factually arise in *Hebert*, the Court provided some guidance on the scope of the right to silence in this context, again tying it into the concept of "choice":

... there is nothing in the rule to prohibit police from questioning the accused in the absence of counsel after the accused has retained counsel. Presumably, counsel will inform the accused of the right to remain silent. If the police are not posing as undercover officers and the accused chooses to volunteer information, there will be no violation

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<sup>6</sup> *Singh*, *supra*, note 1, at paras. 25 and 39.

<sup>7</sup> *Id.*, at para. 39.

<sup>8</sup> *Supra*, note 2.

of the Charter. Police persuasion, short of denying the suspect the right to choose or depriving him of an operating mind, does not breach the right to silence.<sup>9</sup>

And:

The state is not obliged to protect the suspect against making a statement; indeed, it is open to the state to use legitimate means of persuasion to encourage the suspect to do so.<sup>10</sup>

This interplay between the common law rule and the Charter was explored further in *Oickle*<sup>11</sup> when the Court considered the common law limits on police interrogation under the confessions rule. Justice Iacobucci commented that the case provided an important opportunity “to set out the proper scope of the confessions rule”, noting that the issue had not been directly addressed by the Court since the introduction of the Charter.<sup>12</sup>

The thematic thrust of *Oickle* was that common law voluntariness is concerned chiefly with the reliability of statements obtained through police interrogation to safeguard against the danger of false confessions and resulting miscarriages of justice. At the outset of discussing the “precise scope” of the confessions rule “today”, Iacobucci J. stated:

... the confessions rule is concerned with voluntariness, broadly defined. One of the predominant reasons for this concern is that involuntary confessions are more likely to be unreliable. The confessions rule should recognize which interrogation techniques commonly produce false confessions so as to avoid miscarriages of justice.<sup>13</sup>

This philosophical approach was evident throughout the judgment. The focus on reliability as the cornerstone of voluntariness shifted but briefly when the Court discussed the “community shock” test that was articulated by Lamer J. in *R. v. Rothman*.<sup>14</sup> It was only in relation to police trickery that would shock the conscience of the community that the Court allowed for accommodation, within the confessions rule, of an objective that is distinct from reliability; that is based on concern for

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<sup>9</sup> *Id.*, at para. 73.

<sup>10</sup> *Id.*, at para. 53.

<sup>11</sup> *Supra*, note 3.

<sup>12</sup> *Id.*, at para. 23.

<sup>13</sup> *Id.*, at para. 32.

<sup>14</sup> [1981] S.C.J. No. 55, [1981] 1 S.C.R. 640 (S.C.C.).

“maintaining the integrity of the criminal justice system” and for “protection of the accused’s rights and fairness in the criminal process”.<sup>15</sup>

Apart from the kind of egregious and appalling conduct that would meet the “community shock” standard, the Court expressed no concern for the treatment of accused by the police beyond its potential to impugn the statement’s reliability. The modern day confessions rule that emerged in *Oickle* relegates fairness to an afterthought, once the reliability of the statement is assured. If the conduct of the police could have induced a false confession, then it was, no doubt, unfair to boot. Perhaps not surprisingly, *Oickle* was the subject of much academic criticism for its near-exclusive focus on reliability and seeming disregard for procedural fairness in delineating the limits on police conduct under the common law rule.<sup>16</sup>

Just eight months before its judgment in *Singh*, the Court reaffirmed *Oickle*’s reliability-preoccupied formulation of the confessions rule in the case of *R. v. Spencer*.<sup>17</sup> The Court’s determined focus on reliability as the barometer of police impropriety under the confessions rule fit sensibly with its earlier decision in *Hebert*. When the Court turned, in *Oickle*, to set out the proper scope of the confessions rule, it had already recognized, in *Hebert*, the additional scope for protection against unfair police practices afforded by section 7. Indeed, Iacobucci J. specifically stated that “the focus [of *Hebert*] was on defining constitutional rights”<sup>18</sup> and that:

... it would be a mistake to confuse it [the common law confessions rule] with the protections given by the Charter. While obviously it may be appropriate, as in *Hebert*, ... to interpret one in light of the other, it would be a mistake to assume one subsumes the other entirely.<sup>19</sup>

With the Charter in its back pocket to take care of fairness concerns that did *not* touch on reliability, the Court adopted a relatively conservative approach to the confessions rule. There was simply no need to radically update it. If the Crown could prove beyond a reasonable doubt that the statement was voluntary, then it would still be open to the

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<sup>15</sup> *Oickle*, *supra*, note 3, at paras. 65-67, 69.

<sup>16</sup> See, e.g., Don Stuart, “*Oickle*: The Supreme Court’s Recipe for Coercive Interrogation” (2000) 36 C.R. (5th) 188; Edmund Thomas, “Lowering the Standard: *R. v. Oickle* and the Confessions Rule in Canada” (2005) 10 Can. Crim. Law Rev. 69.

<sup>17</sup> [2007] S.C.J. No. 11, [2007] 1 S.C.R. 500 (S.C.C.) [hereinafter “*Spencer*”].

<sup>18</sup> *Oickle*, *supra*, note 3, at para. 29.

<sup>19</sup> *Id.*, at para. 31.

accused to establish, on the lower standard of proof, that the conduct of the police nonetheless offended against her section 7 right to silence. The Charter could provide residual protection against unfairness that was not caught by the confessions rule. One might say that *Hebert* offered a level of comfort to the Court which enabled its decision in *Oickle*.

But in *Singh*, the Court turned sharply from what its earlier judgments appeared to forecast. The modern confessions rule, as it emerged from *Oickle*, was grafted onto the Charter right to silence in this context. Justice Charron acknowledged that section 7 might afford additional protection beyond the common law *in different contexts* (as it had in *Hebert*), but *not in this one*.<sup>20</sup>

No doubt, *Singh* came as a surprise to defence counsel who, after *Oickle*, were crafting their arguments for exclusion, based on unfair police conduct, around section 7. Indeed, in *Singh* itself, the voluntariness of the statements was conceded, both at trial and on appeal.<sup>21</sup> It was *Singh*'s position that although his statements to the police were voluntary in the common law sense, the conduct of the police — who persisted in questioning him in the face of 18 assertions that he wished to remain silent — so influenced or interfered with his exercise of choice, that his right to remain silent was trammelled upon. In the end, of course, his concession as to voluntariness went a long way toward deciding the section 7 argument.

### III. A BALANCING OF INTERESTS

The principle against self-incrimination, which grounds the section 7 right to silence, has been described by the Court as perhaps the single most important organizing principle in criminal law.<sup>22</sup> The right to silence at trial is specifically protected by section 11(c) of the Charter. With few exceptions, the Crown cannot make evidentiary use of an accused's silence upon arrest or at trial.<sup>23</sup>

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<sup>20</sup> *Singh*, *supra*, note 1, at para. 40.

<sup>21</sup> *Id.*, at para. 22.

<sup>22</sup> *R. v. P. (M.B.)*, [1994] S.C.J. No. 27, [1994] 1 S.C.R. 555 (S.C.C.); *R. v. Jones*, [1994] S.C.J. No. 42, [1994] 2 S.C.R. 229 (S.C.C.); *R. v. S. (R.J.)*, [1995] S.C.J. No. 10, [1995] 1 S.C.R. 451 (S.C.C.).

<sup>23</sup> *R. v. Chambers*, [1990] S.C.J. No. 108, [1990] 2 S.C.R. 1293 (S.C.C.); *R. v. Noble*, [1997] S.C.J. No. 40, [1997] 1 S.C.R. 874 (S.C.C.); *R. v. Turcotte*, [2005] S.C.J. No. 51, [2005] 2 S.C.R. 519 (S.C.C.).

As observed by McLachlin J. (as she then was) in *Hebert*, the right to silence is equally important at the investigatorial phase:

The protection conferred by a legal system which grants the accused immunity from incriminating himself at trial but offers no protection with respect to pre-trial statements would be illusory.<sup>24</sup>

At this stage, the accused is particularly vulnerable to self-incrimination. He or she is within the custody and control of the state without the same luxury of protracted consultation with counsel and reasoned reflection that would bear on a decision to waive the right to silence at trial by testifying. One might expect, then, special sensitivity to the crucial importance of the right to silence at this juncture — and to the impact of police conduct on the detainee’s exercise of choice.

Yet, *Singh* shows a high degree of tolerance for police persuasion or influence upon the detainee’s decision to speak. Justice Charron reasoned that this tolerance strikes a necessary balance between the accused’s interests and the competing interests of the state in the effective investigation and prosecution of crime. She noted that police interrogation plays a particularly important role in the investigation of crime, stating:

One can readily appreciate that the police could hardly investigate crime without putting questions to persons from whom it is thought that useful information may be obtained. The person suspected of having committed the crime being investigated is no exception. Indeed, if the suspect in fact committed the crime, he or she is likely the person who has the most information to offer about the incident. Therefore, the common law also recognizes the importance of police interrogation in the investigation of crime.<sup>25</sup>

In *Singh*, the Court placed an extraordinary premium on state investigative interests in the context of post-arrest interrogation. This is well illustrated by the starkly different outcome to a similar balancing exercise in *R. v. Couture*,<sup>26</sup> which was decided by the Court some five months prior to *Singh*. At stake in *Couture* was the accused’s interest in protecting the harmony of his marriage and, in the balance, it beat out competing societal interests in effective law enforcement.

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<sup>24</sup> *Hebert*, *supra*, note 2, at para. 45.

<sup>25</sup> *Singh*, *supra*, note 1, at para. 28.

<sup>26</sup> [2007] S.C.J. No. 28, [2007] 2 S.C.R. 517 (S.C.C.) [hereinafter “*Couture*”].

At issue in *Couture* was the admissibility of statements provided by Couture's wife to the police. Couture confessed to her that he had killed two young women. After their marriage, the wife approached the police and told them about his confessions. She was non-compellable by the Crown because of the operation of the common law rule of spousal incompetency so the Crown argued that her hearsay statements were admissible on principled analysis.

Even though the common law rule, which is *testimonial* in nature, has no application to the out-of-court *statements* of a spouse, Charron J., for the majority, reasoned that its *underlying rationales* would be undermined by the admission of spousal hearsay statements made *during the course of the marriage*. The policy rationales which underpin the rule of spousal incompetency relate to the promotion of marital harmony and the repugnance of compelling one spouse to testify against the other in court. The rule has been criticized for being archaic, historically rooted in outmoded views of women and marriage, and as a senseless obstacle to truth-seeking that unjustifiably suppresses relevant evidence. In *R. v. Salituro*,<sup>27</sup> the Court described it as antithetical to Charter-based equality values and signalled to Parliament that it was time to consider its abolition. But in *Couture*, the Court breathed new life into it, extending its policy-based rationale well beyond *testimonial* incapacity at the cost of excluding highly cogent incriminating evidence.

This concern for the accused's interest in protecting his marriage at such sizeable expense to the truth-seeking process seems diametrically at odds with the Court's approach in *Singh*. One might expect that an accused's interest in being protected against the risk of self-incrimination by having his or her own statements used against him or her is at least as pressing as an accused's interest in being protected against any potential disruption to his or her marriage, brought about by permitting the statements of the spouse to incriminate the accused. Surely the interest against self-incrimination, founded, as it is, on a central organizing principle of criminal law, out-classes an interest that rests on a shaky, outdated policy foundation. Both *Singh* and *Couture* were charged with murder, so society's interest in having all reliable evidence come forth that could lead to a conviction was present in equal force in both cases. Ironically, if the police had pressured Mr. Couture to confess by relentlessly bombarding him with questions despite his protestations, his confession would have been admitted; yet, his

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<sup>27</sup> [1991] S.C.J. No. 97, [1991] 3 S.C.R. 654 (S.C.C.).



confession to his spouse — who volunteered it to the police without prompting — was excluded.

#### IV. WHAT LIES AHEAD FOR THE PRE-TRIAL RIGHT TO SILENCE?

##### 1. Interplay with Section 24(2)

The hard line taken by the Court on the section 7 right to pre-trial silence in *Singh* may have been influenced by the strictures of *R. v. Stillman*,<sup>28</sup> which effectively created an automatic rule of exclusion for conscriptive evidence obtained pursuant to a Charter breach. *Stillman* left virtually no flexibility to admit conscriptive, non-discoverable evidence under section 24(2), holding that its admission will ordinarily result in unfairness, thereby warranting exclusion under the “trial fairness” branch of the section 24(2) analysis without regard for the other “*Collins*” factors.<sup>29</sup>

In *Hebert*, which predated *Stillman*, the Court envisioned a more flexible application of section 24(2). Justice McLachlin (as she then was), specifically adverted to the possible admission of evidence obtained through a breach of the Charter-protected right to silence. She wrote:

Drawing the balance where I have suggested the Charter draws it permits the courts to correct abuses of power against the individual, while allowing them to nevertheless admit evidence under s. 24(2) where, despite a Charter violation, the admission would not bring the administration of justice into disrepute.<sup>30</sup>

And:

I should not be taken as suggesting that violation of an accused’s right to silence under s. 7 automatically means that the evidence must be excluded under s. 24(2). I would not wish to rule out the possibility that there may be circumstances in which a statement might be received where the suspect has not been accorded a full choice in the sense of having decided, after full observance of all rights, to make a statement voluntarily.<sup>31</sup>

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<sup>28</sup> [1997] S.C.J. No. 34, [1997] 1 S.C.R. 607 (S.C.C.) [hereinafter “*Stillman*”].

<sup>29</sup> *Id.*, at paras. 102, 119.

<sup>30</sup> *Hebert*, *supra*, note 2, at para. 71.

<sup>31</sup> *Id.*, at para. 88; see also para. 79.

*Stillman* could have had a chilling effect on the Court's willingness to more broadly construe the section 7 right in this context since statement evidence obtained in breach of section 7 will always be conscriptive in nature and subject to its rule of automatic exclusion. Broader recognition of the right would mean that highly probative and reliable evidence would routinely be lost without consideration of how relatively serious the police conduct giving rise to the breach was, or whether its exclusion would have a deleterious impact on the repute of the administration of justice.

Sensitivity to the implications of a rigid section 24(2) analysis factored into Charron J.'s reasons in *Singh*. The appellant argued that section 7 imposed an obligation on police to refrain altogether from trying to question a detainee once that detainee asserted the wish to remain silent. In rejecting that position, Charron J. observed that the protection afforded by the confessions rule was directed at "the potential abuse by the state of its superior powers over a detained suspect"; yet under the Appellant's suggested approach, "any statement obtained after the suspect asserts his right to silence would be of questionable admissibility".<sup>32</sup> She further commented that this would be so "regardless of whether there is a causal nexus between the conduct of the police and the making of the statement".<sup>33</sup> The concern was that statements would be excluded whether or not the conduct of the police played a role in their making.

In *R. v. Grant*,<sup>34</sup> the Court has been asked to reconsider *Stillman*. Grant made a self-incriminating statement to the police that led to the discovery of a loaded revolver in his possession. He was walking down the street and attracted the attention of police officers who approached him and asked a few "general questions" that prompted him to divulge that he was in possession of some marijuana and a gun. The Ontario Court of Appeal found that Grant was arbitrarily detained — but did not exclude the evidence, even though its admission would have some impact on trial fairness. Justice Laskin commented on the relevance of the police's conduct to the section 24(2) analysis:

The nature of the police's conduct that yielded the conscriptive evidence is relevant because it is directed to the extent of the state's

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<sup>32</sup> *Singh*, *supra*, note 1, at para. 44.

<sup>33</sup> *Id.*

<sup>34</sup> [2006] O.J. No. 2179 (Ont. C.A.); appeal to S.C.C. heard April 24, 2008, judgment reserved [hereinafter "*Grant*"].

interference with the accused's autonomy and with the accused's freedom of choice whether to participate in the creation of self-incriminatory evidence. The more invasive the interference, the more serious the impact on trial fairness; the less invasive the interference, the less serious the impact on trial fairness.<sup>35</sup>

The Crown/respondent in *Grant* has asked the Court to depart from the ritualistic rule of exclusion that emerged in *Stillman* and to restore the trial fairness branch of the section 24(2) analysis to a more equal footing. There is a wide spectrum of police conduct having varying degrees of influence on the detained suspect's decision to speak. A more flexible section 24(2) analysis would *not* require the exclusion of highly probative evidence *in every case*. There would be scope to consider the relative seriousness of the breach weighed up against the adverse effect on the administration of justice that would flow from the exclusion of reliable evidence that is essential to the prosecution of a serious criminal charge. If the Crown is successful in *Grant*, we may see a gradual willingness by the Court to construe the section 7 Charter right to silence more broadly and a softening of the stance taken in *Singh*. A new approach to section 24(2) would permit important recognition of the content of the section 7 right without the resulting disproportionate cost to the overall administration of justice that the current, "*Stillman* model" leads to.

## **2. Greater Scrutiny of the Quality of Choice Exercised by the Individual**

Now that the voluntariness test sets the constitutional standard for the section 7 right to remain silent, the focus of the inquiry necessarily shifts from the conduct of the police to its impact on the particular detainee.

The central issue in determining the voluntariness of a statement under the confessions rule (and now, under section 7) is whether the suspect's choice to speak was freely made or whether it was so encumbered, influenced or interfered with by the conduct of the police that it cannot be seen as valid. The classic "*Ibrahim* rule", explained and reaffirmed in *Oickle*, is concerned with police conduct that overbears the will of the detainee, meaning that the statement would not have been

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<sup>35</sup> *Id.*, at para. 55.

made but for the improper inducement. As explained by Fish J., in *Spencer*:

In such cases, the will of the detainee has not been “overborne” in the sense that he or she “has lost any meaningful, independent ability to choose to remain silent” ... rather, the will of the detainee is said to have been “overborne” only in the sense that he or she would not otherwise have given a statement but was persuaded to do so in order to achieve an expected result — to avoid threatened pain or achieve promised gain. A statement thus given is the result of a calculated decision by an operating mind; it is nonetheless considered “involuntary” for the reasons set out in both [*Ibrahim v. The King*, [1914] A.C. 599] and [*R. v. Oickle*, [2000] S.C.J. No. 38, [2000] 2 S.C.R. 3 (S.C.C.)].<sup>36</sup>

In *Singh*, the Court recognized that persistent police questioning could also amount to an improper inducement that overbears the will of the detainee, so as to render his or her statement involuntary.<sup>37</sup>

The test for whether the conduct of the police effectively deprived the suspect of the right to choose to remain silent is an objective one;<sup>38</sup> however, the individual circumstances of the detainee are relevant to the assessment. The “need to be sensitive to the particularities of the individual suspect” was emphasized by Iacobucci J. in *Oickle* with the following examples:

False confessions are particularly likely when the police interrogate particular types of suspects, including suspects who are especially vulnerable as a result of their background, special characteristics, or situation, suspects who have compliant personalities and, in rare instances, suspects whose personalities make them prone to accept and believe police suggestions made during the course of the interrogation.

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The strength of mind and will of the accused, the influence of custody or its surroundings, the effect of questions or of conversation, all call for delicacy in appreciation of the part they have played behind the admission, and to enable a Court to decide whether what was said

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<sup>36</sup> *Spencer, supra*, note 17, at para. 32.

<sup>37</sup> *Singh*, [2007] S.C.J. No. 48, [2007] 3 S.C.R. 405, at para. 47 (S.C.C.).

<sup>38</sup> *Id.*

was freely and voluntarily said, that is, was free from the influence of hope or fear aroused by them.<sup>39</sup>

There was regard for “the particular individual and his or her circumstances” in appraising the strength of the inducement in *Spencer* where the Court was mindful of the trial judge’s observations that Spencer was “aggressive” and “a mature and savvy participant”.<sup>40</sup> And in *Singh*, the Court endorsed as “particularly instructive”, Proulx J.A.’s judgment in *R. v. Otis*,<sup>41</sup> excluding the confession of an emotionally vulnerable suspect who was subjected to persistent police questioning.<sup>42</sup>

With less room to manoeuvre on the question of how far the police can go, we can expect to see more attention being paid to the personal circumstances and characteristics of individual accused and the contextual dynamics of police interrogation. The objective oppressiveness of police conduct will be magnified through the prism of a frail and weak personality. The vulnerability that inherently exists in circumstances of police custody and the power imbalance that underlies the dynamic between the detainee and the police can weigh in as important elements toward determining whether there has been an overbearing of the will so as to legally invalidate the choice to speak.

A helpful analogy can be drawn to the examination of the quality of apparent consent to sexual activity in circumstances where the accused holds a position of trust, power or authority in relation to the complainant.<sup>43</sup>

In *R. v. Saint-Laurent*,<sup>44</sup> Fish J.A. (as he then was) considered the application of section 265(3)(d) of the *Criminal Code*. The accused was a psychotherapist charged with sexually assaulting two patients. The Crown argued that he exercised authority over both complainants in a way that deliberately induced their submission to sexual relations with him. Justice Fish cited the Supreme Court of Canada’s decision in

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<sup>39</sup> *Oickle*, [2000] S.C.J. No. 38, [2000] 2 S.C.R. 3, at para. 42 (S.C.C.), quoting from W.S. White, “False Confessions and the Constitution: Safeguards Against Untrustworthy Confessions” (1997) 32 Harv. C.R.-C.L. L. Rev. 105, at 120 and Rand J. in *R. v. Fitton*, [1956] S.C.J. No. 70, [1956] S.C.R. 958, at 962 (S.C.C.).

<sup>40</sup> *Spencer*, [2007] S.C.J. No. 11, [2007] 1 S.C.R. 500, at paras.13-15, 21 (S.C.C.).

<sup>41</sup> [2000] Q.J. No. 4320, 151 C.C.C. (3d) 416 (Que. C.A.).

<sup>42</sup> *Singh*, *supra*, note 37, at paras. 50, 53.

<sup>43</sup> Section 265(3)(d) of the *Criminal Code*, R.S.C. 1985, c. C-46 (which applies to sexual assault) provides that “no consent is obtained where the complainant submits or does not resist by reason of ... the exercise of authority”; and s. 273.1(2)(c) provides that no consent to sexual activity is obtained where “the accused induces the complainant to engage in the activity by abusing a position of trust, power or authority”.

<sup>44</sup> [1993] Q.J. No. 2257, 90 C.C.C. (3d) 291 (Que. C.A.).

*Norberg v. Wynrib*<sup>45</sup> which recognized that “a position of relative weakness can, in some circumstances, interfere with the freedom of a person’s will”<sup>46</sup> and that “in certain circumstances, consent will be considered legally ineffective if it can be shown that there was such a disparity in the relative positions of the parties that the weaker party was not in a position to choose freely”.<sup>47</sup> Justice Fish stressed that the trier of fact “must remain ever mindful of the vulnerability of the victim”<sup>48</sup> in such circumstances because the quality of the victim’s apparent consent could be significantly compromised by them:

As a matter both of language and of law, consent implies a reasonably informed choice, freely exercised. No such choice has been exercised where a person engages in sexual activity as a result of fraud, force, fear, or violence.

.....

“Consent” is, thus, stripped of its defining characteristics when it is applied to the submission, non-resistance, non-objection or even the apparent agreement, of a deceived, unconscious or compelled will.<sup>49</sup>

These views were endorsed by the Ontario Court of Appeal in *R. v. Matheson*,<sup>50</sup> which also involved a psychologist who exercised his control and authority over two patients to induce them to submit to sexual relations.

More recently in *R. v. S. (D.)*<sup>51</sup> the Ontario Court of Appeal found that the complainant’s consent was induced through the abuse of a position of power by the accused. The accused persuaded the complainant, his former girlfriend, to consent to sexual relations with him by threatening to disseminate nude photographs of her if she refused. Interestingly, the Court also held that there was no need to resort to section 273.1 of the *Criminal Code* because, in the circumstances, there was no voluntary agreement by the complainant to engage in sexual activity. The Court reasoned that the accused’s conduct exerted such extreme pressure on the complainant that she was unable to freely choose whether or not to engage in the sexual activity. Her

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<sup>45</sup> [1992] S.C.J. No. 60, [1992] 2 S.C.R. 226 (S.C.C.).

<sup>46</sup> *Id.*, at para. 27.

<sup>47</sup> *Id.*, at para. 34.

<sup>48</sup> *Saint-Laurent, supra*, note 44, at para. 96.

<sup>49</sup> *Id.*, at paras. 98-99.

<sup>50</sup> [1999] O.J. No. 1320, 134 C.C.C. (3d) 289 (Ont. C.A.).

<sup>51</sup> [2004] O.J. No. 3440 (Ont. C.A.).

apparent choice to sexually submit to him was so qualitatively compromised by the potency of his threat that it was rendered legally invalid — even though she *could* have refused and faced the threatened consequences. The Court of Appeal’s judgment was affirmed by the Supreme Court of Canada.<sup>52</sup>

Borrowing from the principles in these cases, there is scope to develop a more context-sensitive appraisal of the legal effectiveness of a detainee’s “choice” to speak.

### 3. Invigoration of the Section 10(b) Right to Counsel

In the aftermath of *Singh*, arguments for the exclusion of self-incriminating statements might meet with greater success if framed under the broader auspices of section 10(b) of the Charter.

Unlike the section 7 right to silence, the section 10(b) guarantee has been more generously interpreted by the Court. In *Singh*, Charron J. distinguished between the two rights, stating:

Under the *Charter*, the right to counsel, including an informational and implementational component, is provided for expressly. No such provision appears in respect of the right to silence.<sup>53</sup>

She adopted this explanation of the reason for the difference:

Although the right to counsel and right to silence are equally important rights, it does not follow that they will be protected in the same way ... The right to silence, by its very nature, is exercised differently than the right to counsel and in this respect, the right to silence and right to counsel are not the same. The exercise of the right to silence is within the control of an accused who has an operating mind and is fully informed of his or her rights, provided the conduct of the authorities do not take away his or her ability to choose. In contrast, the exercise of the right to counsel is not within the control of an accused in detention. Rather, it is dependant upon the police facilitating the exercise of that right.<sup>54</sup>

Central to the expansive approach taken to the right to counsel is recognition of its crucial role in ensuring that the accused understands

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<sup>52</sup> *R. v. S. (D.G.)*, [2005] S.C.J. No. 36, [2005] 1 S.C.R. 914 (S.C.C.).

<sup>53</sup> *Singh*, *supra*, note 37, at para. 43.

<sup>54</sup> *Id.*, quoting from Hackett J. in *R. v. G. (C.)*, [2004] O.J. No. 229, at para. 93 (Ont. C.J.).

his or her rights; most importantly, the accused's right to remain silent. This was discussed by McLachlin J. (as she then was) in *Hebert*:

The most important function of legal advice upon detention is to ensure that the accused understands his rights, chief among which is his right to silence. The detained suspect, potentially at a disadvantage in relation to the informed and sophisticated powers at the disposal of the state, is entitled to rectify the disadvantage by speaking to legal counsel at the outset, so that he is aware of his right not to speak to the police and obtains appropriate advice with respect to the choice he faces. Read together, ss. 7 and 10(b) confirm the right to silence in s. 7 and shed light on its nature.<sup>55</sup>

The section 10(b) right has been cast as the watchdog of the right to silence. It is the detainee's chief procedural protection at the investigative stage, when in police custody and most vulnerable to the risk of self-incrimination.

The police must refrain from attempting to elicit evidence from a detainee until that detainee has had a reasonable opportunity to confer with counsel.<sup>56</sup> Once a reasonable opportunity to retain and instruct counsel has been provided, the police may question the accused. However, when there is a change in the jeopardy faced by the accused or a fundamental change in the purpose of the investigation, police must suspend questioning and, again, provide a reasonable opportunity to exercise the section 10(b) right.<sup>57</sup>

Consider the detainee who consults with counsel and then asks to do so again after police questioning is underway because he or she is thinking about providing a statement but would like to consult with his or her lawyer first. It may be that police have provided information or presented evidence that the detainee would like to share with the lawyer. Even though the extent of the detainee's jeopardy and the purpose of the investigation have not changed, the risk of self-incrimination can easily increase as the interview progresses. Since the right to counsel is integral to protecting the right to silence, the refusal of renewed contact with

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<sup>55</sup> *Hebert*, [1990] S.C.J. No. 64, [1990] 2 S.C.R. 151, at para. 52 (S.C.C.).

<sup>56</sup> *R. v. Manninen*, [1987] S.C.J. No. 41, [1987] 1 S.C.R. 1233 (S.C.C.); *R. v. Ross*, [1989] S.C.J. No. 2, [1989] 1 S.C.R. 3 (S.C.C.).

<sup>57</sup> *R. v. Black*, [1989] S.C.J. No. 81, [1989] 2 S.C.R. 138 (S.C.C.); *R. v. Evans*, [1991] S.C.J. No. 31, [1991] 1 S.C.R. 869 (S.C.C.).



counsel in such circumstances could, arguably, result in a breach of the section 10(b) right.<sup>58</sup>

Police conduct which undermines the solicitor/client relationship also runs afoul of the section 10(b) right. During an interrogation, police are, of necessity, trying to overcome the advice given by counsel. They cannot, however, belittle the accused's lawyer so as to undermine his or her confidence in the relationship. In *R. v. Burlingham*,<sup>59</sup> the police actively disparaged the accused's lawyer; but there is scope to argue that less blatant conduct can produce the same effect.

Persistent questioning in the face of an assertion of the wish to remain silent signals to the detainee that he or she should disregard the lawyer's advice to remain silent. At a minimum, the message is implicit. Often, it is more direct. For instance, police may suggest that because they are present and the lawyer is not, they are in a better position to fully understand the detainee's predicament and to provide guidance that serves his or her interests.

The dissenting judgment in *Singh* was sensitive to implications to the appellant's section 10(b) right arising from the interrogation tactics of the police. Justice Fish wrote:

... the interrogator urged Mr. Singh, subtly but unmistakably, to forsake his counsel's advice.

.....

To the officer's knowledge, Mr. Singh had been advised by his lawyer to exercise his right to silence. The officer, with irony, if not cynicism, discounted this "absolutely great advice" (his words) as something he too would say if he were Mr. Singh's lawyer. And he then pressed Mr. Singh to instead answer his questions — "to confess no matter what".

Mr. Singh was thus deprived not only of his right to silence, but also, collaterally, of the intended benefit of his right to counsel. These rights are close companions, like glove and hand.<sup>60</sup>

This aspect of the interrogation was found to be "particularly disturbing".

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<sup>58</sup> See *R. v. Sinclair*, [2008] B.C.J. No. 502 (B.C.C.A.), leave to appeal to S.C.C. granted October 18, 2008 (file no. 32537); *R. v. Badgerow*, [2008] O.J. No. 3416 (Ont. C.A.); *R. v. Whitford*, [1997] A.J. No. 309, 196 A.R. 97 (Alta. C.A.), leave to appeal to S.C.C. refused, 117 C.C.C. (3d) vi.

<sup>59</sup> [1995] S.C.J. No. 39, [1995] 2 S.C.R. 206 (S.C.C.).

<sup>60</sup> *Singh*, *supra*, note 37, at paras. 60-62.